

Appeal from a decision of the California Desert District Manager, Bureau of Land Management, determining the fair market rental of communication site right-of-way CA 12457.

Set aside and remanded.

1. Appraisals--Communication Sites--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Appraisals

The appraised value of a communication site right-of-way pertains to each individual user and is not to be prorated among site users.

2. Appraisals--Communication Sites--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Appraisals

In establishing the fair market rental value for a communication site right-of-way, BLM shall not be limited by the estimated value at the time of issuance of the right-of-way.

3. Appraisals--Communication Sites--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Appraisals

An appraisal of fair market rental value for a communication site right-of-way may be set aside and the case remanded where the record on appeal shows insufficient analysis of the leases considered in the appraisal.

4. Communication Sites--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Generally

Pursuant to 43 CFR 2803.1-2(b)(2)(ii), a reduction or waiver of rental for a communication site right-of-way may be granted when the holder provides without charge, or at a reduced rate, a valuable public service.

5. Communication Sites--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Generally

BLM may reduce rental payments for communication site rights-of-way if it determines pursuant to 43 CFR 2803.1-2(b)(2)(iv) that the imposition of the fair market value rental would cause undue hardship on the right-of-way holder and it is in the public interest to do so.

APPEARANCES: Bruce J. Branson, Lone Pine, California, for Lone Pine Television, Inc.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Lone Pine Television, Inc. (LPT), appeals an August 20, 1987, decision by the California Desert District Manager, Bureau of Land Management (BLM), establishing the fair market rental value for communication site right-of-way CA 12457 at \$3,000 per year.

Since 1958, LPT's translator station has been located on Cerro Gordo peak in the NE $\frac{1}{4}$ sec. 24, T. 16 S., R. 38 E., Mount Diablo Meridian, Inyo County, California. Prior to 1981, LPT participated in lease agreements with the holders of a mining claim under the belief that the mining claimants, rather than BLM, held the surface rights to the site. On February 19, 1982, LPT filed its application for a communication site right-of-way with BLM. Communication site right-of-way CA 12457 was issued on November 10, 1982, pursuant to Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1982), for a period of 30 years. The right-of-way grant set the rental at "\$1,000 per year subject to adjustment by formal appraisal" (Grant at 1).

BLM conducted an appraisal of CA 12457 using the comparable lease method of appraisal, which is the preferred method where there is sufficient comparable rental data. Southern California Gas Co., 81 IBLA 358 (1984); Mountain States Telephone & Telegraph Co., 109 IBLA 142 (1989). The factors used for comparison were time, location, site amenities, electronic versatility, and character. The Cerro Gordo site was compared to each of six other communication site rights-of-way based on these factors. In an appraisal report dated June 24, 1987, BLM's appraiser concluded the fair market rental for right-of-way CA 12457 is \$3,000.

On the basis of that report, BLM issued its decision adjusting the rental to \$3,000. On September 16, 1987, LPT filed its notice of appeal from that decision.

[1] In its statement of reasons (SOR), appellant argues that the appraised value of the communication site should be divided among site users (so that the total received by BLM would equal \$3,000), and submits that when Inyo County appraised the Cerro Gordo communication site in 1982 it utilized this approach. We find this argument without merit. The Board has previously held that the appraised value of a communication site is not to be prorated among the users of the site. Chalfont Communications, 108 IBLA 195, 197 (1989); Donald R. Clark, 39 IBLA 182, 190-91 (1979); Circle L, Inc., 36 IBLA 260, 263 (1978).

[2] Appellant argues that although BLM claims to use the Consumer Price Index (CPI) to adjust lease prices, LPT's rental increased by 300-percent, 1/ while the CPI estimated the inflation rate for 1986 at only 4.3-percent. This argument is based on the erroneous assumption that \$1,000 was the fair market value at the time the right-of-way was issued. The initial \$1,000 rental was not based on an appraisal and was recognized in the right-of-way grant as an estimate which was to be effective only until an appraisal could be completed. The difference between the estimated rental at the time the right-of-way was granted and the appraised rental value is not a basis for reversing BLM. Chalfont Communications, supra at 196; Southern California Gas Co., supra.

LPT also presents a lengthy comparison of the Cerro Gordo site and the Rodman site, which was one of the comparables utilized in BLM's appraisal. Although this comparison is not a formal appraisal, it does raise significant questions concerning the accuracy of the BLM appraisal.

The BLM appraisal found the Cerro Gordo site to be superior to Rodman in every factor compared. LPT alleges that BLM ignored the severe weather and high altitude at Cerro Gordo, 2/ and that Cerro Gordo is in fact inferior to Rodman. LPT asserts that the road to its site is closed during the winter months; that winter access is necessary to remove ice from antennas; and that during the winter, LPT's employees "walk the last two miles to the site with snow shoes and rockclimbing cleats" (SOR at 5). Furthermore, LPT suggests that BLM could not have taken the severe problems of winter access into account because it performed its appraisal of the Cerro Gordo site during the summer. LPT also alleges that a four wheel drive vehicle is necessary to reach the site when the road is not closed. In addition, appellant alleges that the electricity at Cerro Gordo is much less reliable than at Rodman. Specifically, LPT states, "Rodman [mountain] has several momentary outages each [year]. Cerro Gordo has many outages, some as long as several days" (SOR at 6).

BLM's appraisal did consider some of the problems mentioned by appellant. The appraisal report recognizes that the last few miles of the trip to the Cerro Gordo site require a four wheel drive vehicle (Appraisal Report at 2). The appraiser's impression of the Cerro Gordo site was that it is a "fairly good site for most uses, however, [its] remote location and exposure to severe weather seem to offset many of the advantages" (Appraisal Report at 3).

However, it is not clear that the appraiser considered whether the Cerro Gordo access road is open all year, or whether the electrical power at the site is reliable. Appellant claims the Cerro Gordo access road is closed during the winter, while the data sheet attached to the appraisal

1/ We note that an increase from \$1,000 to \$3,000 is an increase of 200-percent, not 300-percent.

2/ The elevation of Cerro Gordo is 9,184 feet, while Rodman's elevation is 6,000 feet. Of the comparables used in BLM's appraisal, Eagle Ridge is the highest with an elevation of 6,950 feet.

report indicates the Rodman access road is not closed. ^{3/} Both appellant and BLM agree that Cerro Gordo must be reached by a four wheel drive vehicle even during fair weather, and no such requirement is mentioned for the Rodman site. Appellant makes allegations concerning the sporadic availability of electricity at Cerro Gordo as compared to Rodman, and the appraisal report does not mention the reliability of the electrical distribution systems. The appraisal report defines site amenities as "a combination of the availability of road access and commercial electricity" (Appraisal Report at 6) and the Rodman site was rated as inferior to the Cerro Gordo site in the site amenities category.

[3] Although appellant has not established that the rental is excessive, we conclude it has raised doubt sufficient to justify remanding the issue of the fair market rental value to BLM for reconsideration. See Communications Enterprises, Inc., 105 IBLA 132 (1988); Denver & Rio Grande Western Railroad Co., 58 IBLA 4 (1981). Accordingly, on remand, BLM shall reconsider appellant's allegations regarding the comparability of the Cerro Gordo and Rodman sites and issue an appealable decision. Appellant, however, must bear the ultimate burden of establishing that access problems such as those described have a direct effect on fair market value.

Appellant also provides information concerning various property sales, suggesting that they be used as comparables. Appellant makes no attempt to establish that these parcels are suitable for communication sites; indeed, it would appear as though some of the parcels have been sold for residential development. The BLM appraiser found that the highest and best use for the Cerro Gordo site is as a communication site right-of-way and that the rental value can best be determined by comparing it with other communication sites. Furthermore, we have previously declined to compare communication sites with residential property. Jancur, Inc., 93 IBLA 310, 312 (1986). ^{4/}

^{3/} Among the other comparables utilized in the appraisal, the Eagle Ridge site has its access road closed 1 or 2 months per year, the Pelato site access road is closed rarely, and the others never have their access roads closed. Yet, Cerro Gordo's site amenities are rated as superior to four of the comparables and equal to the other two comparables. Although vehicular accessibility during winter is obviously not the only consideration in rating site amenities, it certainly is one factor which should be considered.

^{4/} Appellant also offers a photocopy of a May 15, 1979, agreement between appellant and Cerro Gordo Mines, holder of the mining claim on which the communication site is located. At the time of execution of this agreement, both parties erroneously believed that Cerro Gordo Mines had the authority to grant a communication site right-of-way, and appellant alleges they agreed to a \$300 annual rental for a 5-year period (SOR at 4, Exh. F-1). However, the record contains another copy of an agreement dated May 15, 1979, between Cerro Gordo Mines and LPT, which appellant submitted with its right-of-way application. This document purportedly transferred the same right-of-way for a 10-year period for \$10. Based on this record, we cannot find either of these documents valuable as a comparable.

Appellant disputes BLM's conclusion that the market population of the Cerro Gordo communication site is 5,000. Although the attachments to BLM's appraisal report give population estimates for most of the comparables, the report does not indicate the population estimate BLM utilized in conducting its appraisal of the Cerro Gordo site. ^{5/} Furthermore, there is nothing in the record to suggest the methodology utilized by BLM in estimating the population, or what effect a different market estimate would have on the fair market value of the site. Appellant has presented a photocopy of estimated 1980 populations from an unidentified document, along with various population calculations and states the local population is actually 2,390 (SOR Exhs. G-1 and G-2).

From the record, we are unable to evaluate appellant's arguments concerning population. However, it is clear that population is relevant in appraising rights-of-way which provide transmission sites for television signals. Communications Enterprises, Inc., supra at 134. On remand, BLM should indicate in the record the figure it is utilizing as a population estimate and specify its source. ^{6/}

[4] LPT argues that it provides various public services which qualify it for reduction or waiver of rental. Appellant states it "provides 5 translator channels for those citizens unable to receive our cable service. We ask for a small donation for maintenance and repairs but collect less than 30% of our costs. We translate these channels as a PUBLIC SERVICE. THERE IS NO PROFIT" (SOR at 2, emphasis in original). In support of this proposition, LPT attaches a letter from the County Administrator (SOR Exh. A-2 at 1) and alleges it reported a loss on its federal income tax returns for 1981 and 1983 through 1986 (SOR at 2).

LPT continues, "At no cost to our translator customers, but at considerable cost of several thousand of dollars to Lone Pine Television we also provide a PBS [Public Broadcasting Service] translated signal for the sparsely populated areas around Lone Pine" (SOR at 2). Appellant has attached to its SOR a letter from the Inyo County Office of Education ^{7/}

^{5/} Appellant states it was informed of BLM's population estimate orally (SOR Exh. G-2).

^{6/} Appellant presents one further argument concerning fair market value by questioning why it "is being charged 100% of the fair market value every year. In real estate, it is customary to charge 1% of an established market rental value for property tax" (SOR at 3). Under 43 U.S.C. § 1764(g) (1982) and 43 CFR 2803.1-2(a) right-of-way holders are expressly required to pay fair market rental value annually, with certain enumerated exceptions, none of which applies here.

^{7/} The Inyo County Office of Education letter, dated Sept. 28, 1987, states, "Both the cable and the translator delivery of PBS has been provided at no additional cost to the cable subscribers or to the translator reception areas. Lone Pine Cable Television provides a very valuable service to residents of Lone Pine and other southern Inyo County communities" (Exh. A-3 at 1).

and a copy of a document transferring certain broadcast rights from the Office of Inyo County Superintendent of Schools to LPT (Exh. A-3 at 2-3).

Appellant further contends the only access BLM has to its own repeaters is across property patented to LPT, that BLM has mounted antennas on appellant's poles, and that appellant receives nothing from BLM for the use of its property. In a letter dated January 8, 1987, the Ridgecrest Resource Area Manager, BLM, states:

We also appreciate the services Lone Pine TV has been providing for BLM and other users of the communications site. We do not feel, however, that reducing Lone Pine TV's rent for its right-of-way CA 12457 is the proper way to recognize the company's contribution. * * * BLM is prepared to organize a meeting of these users and facilitate a more equitable distribution of the costs of operation and maintenance of the site * * *.

(Letter of Jan. 8, 1987, at 1). ^{8/} The record does not reveal whether the operation and maintenance costs have been redistributed.

Appellant also alleges that it shares "services with Inyo County performing many tasks for them without charge that they would otherwise pay for. * * * We make a substantial savings to the County on many services and BLM has long benefited from these services since their repeaters are in the County building." Attached to appellant's SOR is a letter from the Inyo County Director of Public Works/Road Commissioner enumerating services which LPT provides for the county (Exh. C-1).

The regulation at 43 CFR 2803.1-2(b)(2)(ii) provides for reduction or waiver of the rental payment if "[t]he holder provides without charge, or at reduced rates, a valuable benefit to the public or to the programs of the Secretary." The record contains no evidence that BLM considered LPT's eligibility for reduction or waiver based on provision of PBS and translator channels. BLM admits in its letter of January 8, 1987, that LPT has provided benefits to BLM and other site users, but indicates a preference for solving the inequity by means other than rental waiver or reduction. However, the record does not establish that other means are being utilized to this end.

Thus, on remand BLM should consider LPT's eligibility for waiver or reduction of rental pursuant to 43 CFR 2803.1-2(b)(2)(ii). Tortoise Communications, 105 IBLA 193, 195 (1988). BLM should specify which public service is the basis for any reduction or waiver granted; and for each alleged public service which BLM disallows as a basis for waiver or reduction, BLM should state the reasons for denial.

^{8/} We note that a copy of this letter was attached to appellant's SOR (Exh. A-1), but that the file forwarded to the Board by BLM did not contain one. It is incumbent on BLM to provide the Board with a complete record. Dugan Production Corp., 103 IBLA 362, 364 (1988).

[5] Finally, appellant indicates that it reported losses on its tax returns for 5 of the 6 years from 1981 through 1986 (SOR at 2), and submits evidence in an effort to show that the economy in the Lone Pine area is depressed (Exhs. H-1 and H-2). Therefore, on remand, BLM should also consider the applicability of 43 CFR 2803.1-2(b)(2)(iv) which allows for a reduction or waiver of rental after determinations that "the full rental will cause undue hardship on the holder/applicant and that it is in the public interest to reduce or waive said rental." High Country Communications, Inc., 105 IBLA 14, 18-19 (1988).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the District Manager's decision of August 20, 1987, is vacated and the case is remanded to BLM for further consideration consistent with this decision.

John H. Kelly
Administrative Judge

I concur:

David L. Hughes
Administrative Judge